IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1089 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MOHEMAD HAROON MOHEMAD ANAWAR SHAIKH & Anr.

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1089 of 1997
MS BANNA S DUTTA for Appellant No.1
MR MM TIRMIZI for Appellant No.2
MS P.B.SHETH, A.P.P., for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 14/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 is directed against judgment dated October 17, 1997, rendered by the learned Additional Sessions Judge, Nadiad, in Sessions Case No.71 of 1997, by which the two appellants are convicted under Sections 392, 397 and Section 120B of the Indian Penal Code and each sentenced to R.I. for 14 years and fine of Rs.20,000/-, in default, R.I. for four years for commission of offence punishable under Section 392 I.P.C. as well as R.I. for seven years and fine of Rs.10,000/-, in default, R.I. for two years for commission of offence punishable under Section 397 I.P.C. and R.I. for five years and fine of Rs.10,000/-, in default, R.I. for one year for commission of offence punishable under Section 120B I.P.C.

2. Kiritbhai Gordhanbhai Patel, residing at Mahemdavad, runs a Petrol Pump in the name of "Amin Auto Centre" near Khatraj Chokdi. He attends Petrol Pump from 10.00 AM in morning till evening and after settling accounts, returns home at about 8.00 PM with daily collections, on his scooter. The incident in question took place on May 11, 1996. On the day of the incident, he was returning home with a sum of Rs. 70,000/- on his scooter bearing Registration No.GJ-7-J-3355. The cash was kept in a wallet, which was placed in front side dicky of the scooter which was locked. When he reached near Parshotam Kheraj Company, a white coloured Tata Estate Car overtook him, which was stopped in his front, as a result of which he was also required to stop his scooter. One person came out from Tata Estate Car and aimed a Tamancha at him, whereas four other persons including driver, who were sitting in the Car, caught hold of him and dragged him towards the Car. The person, who had aimed Tamancha, drove away his scooter, whereas the driver of Tata Estate Car put the Car in motion and he was dragged for a distance of about half a kilometer. Shouts for help were raised by Kiritbhai, but as the road was deserted, none could come to his rescue. After throwing him on the ground while the Car was in motion, the occupants of the Car fled away. Because of dragging etc., Kiritbhai sustained injuries on knees and neck. A rickshaw coming from Mahemdavad side was stopped by him, in which he went to the Well of his acquaintance whose name is Kiritbhai Shankerbhai Patel. The incident was narrated by Kiritbhai Gordhanbhai Patel to Kiritbhai Shankerbhai Patel. Thereafter both of them went to

Mahemdavad Police Station for lodging complaint. Mr.Mehmoodkhan Kadivala, who was then Senior P.S.I. of Matar Police Station, received a message at about 22.30 hours on May 11, 1996 that an incident of loot had taken place within the jurisdiction of Mahemdavad Police Station and that he should reach the place of incident immediately. Accordingly, Mr.Kadivala, who was in additional charge of Mahemdavad Police Station, went first to Mahemdavad Police Station from Matar Police Station. At that time, Kiritbhai Patel was present at the Police Station and, therefore, his complaint was reduced into writing by P.S.I. Mr.Kadivala. Mr.Kadivala arranged patrolling to apprehend the culprits. Meanwhile, he received information that the scooter belonging to Kiritbhai Gordhanbhai Patel was lying unattended on way to village Chhapara and, therefore, custody of the same was taken under a panchnama. After seizure of the scooter, further investigation into the case was handed over to Circle Police Inspector Mr.Parmar, who visited the place of incident and drew panchnama of place of incident in the presence of panch witnesses. Meanwhile, a message was received by C.P.I. Mr.Parmar from City Crime Branch, Ahmedabad on May 28, 1996 that accused Nasirkhan Shajidkhan Pathan was arrested under Section 41(1)(d) of the Code of Criminal Procedure, 1973 on May 27, 1996 and, therefore, Mr. Parmar went to Ahmedabad and after securing his custody from D.C.P. City Crime Branch, Ahmedabad, arrested formally Nasirkhan with reference to first information report lodged by Kiritbhai G.Patel. The Deputy Commissioner of Police also handed over a sum of Rs.13,000/- found on person of accused Nasirkhan as well as a bunch of keys. Thereafter, the investigating officer came to Mahemdavad alongwith accused Nasirkhan as well as cash and bunch of keys which were handed over to him by D.C.P. City Crime Branch, Ahmedabad. On May 28, 1996, he summoned the complainant, who had identified the bunch of keys as belonging to him, regarding which a panchnama was prepared in the presence of panch witnesses. C.P.I. Mr.Parmar received further information that accused Mohmed Haroon i.e.the appellant No.1 was lodged in Central Jail, Sabarmati with reference to another offence and, therefore, he secured custody of accused Mohmed Haroon on the basis of transfer warrant. On June 22, 1996, Mr.Parmar addressed a yadi to Mamlatdar, Mahemdavad requesting him to hold test identification parade for identification of accused Mohmed Haroon by the complainant. Accordingly, test identification parade was held on June 22,1996 by Mamlatdar, Mahemdavad at which complainant Kiritbhai identified accused Mohmed Haroon as one of the accused

who was involved in the incident which had taken place on May 11, 1996. While in custody, Mohmed Haroon made disclosure statement and, therefore, part of booty which had come to his share and was buried by him at Ahmedabad was discovered in the presence of panch witnesses. It was also learnt by C.P.I. Mr.Parmar that two other accused, namely, Sabirmiya Abbasmiya Sipoy i.e. the appellant No.2 and Mohmed Iqbal were also lodged in Central Jail, Ahmedabad with reference to some other case and, therefore, on the basis of transfer warrant, C.P.I. Mr.Parmar arrested them on June 26, 1996. On June 27, 1996, Mr.Parmar was transferred and, therefore, further investigation into the case was made by Mr.R.K.Upadhyay, who was posted in place of Mr.Parmar. Mr.Upadhyay requested the Mamlatdar, Mahemdavad to hold test identification parade for accused Sabirmiya and accused Mohmed Salim. Accordingly, on June 29, 1996, test identification parade was held wherein the complainant identified accused Sabirmiya and accused Mohmed Salim as persons involved in the incident dated May 11, 1996. Meanwhile, it was learnt by him that accused Nasirkhan Najirkhan Pathan involved in the incident was lodged in Central Jail, Sabarmati with reference to another offence and, therefore, he arrested Nasirkhan with reference to F.I.R. lodged by Kiritbhai Patel on July 5, 1996. Test identification parade of accused Nasirkhan Najirkhan Pathan was also held by the Mamlatdar at the instance of P.I. Mr.Upadhyay. On completion of investigation, all the five accused were chargesheeted in the Court of learned Judicial Magistrate, First Class, Mahemdavad for commission of offences punishable under Section 397 r.w.section 120B I.P.C. and Section 25(1C) of the Arms Act, 1959. As offence punishable under Section 397 IPC is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Kheda at Nadiad for trial, where it was numbered as Sessions Case No.71 of 1997.

3. Exhaustive and self-explanatory charge at Exh.2 was framed against the accused by the learned Additional Sessions Judge, Nadiad to whom the case was made over for trial, under Section 397 r.w.section 34 and Section 120B I.P.C. as well as Section 25(C) of the Arms Act. The charge was read over and explained to the accused, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (i) Jashvantlal Chunilal Patel as PW.1 at Exh.10, (ii) Kiritbhai Gordhanbhai Patel as PW.2 at Exh.15, (iii) Ashokbhai Chandulal Mochi as PW.3 at Exh.20, (iv) Harishbhai Narottamdas Parmar as PW.4 at Exh.22, (v) Chhotabhai Chandabhai Dabhi as PW.5 at Exh.24, (vi) Ravjibhai

Ranchhodbhai as PW.6 at Exh.26, (vii) Sukhvirsing Ajayabsing as PW.7 at Exh.29, (viii) Mukesh Chandulal Khatri as PW.8 at Exh.31, (ix) Chetankumar Kanubhai as PW.9 at Exh.32, (x) Harishbhai Chetankumar Rajput as PW.10 at Exh.33, (xi) Mahemudkhan Ahmedkhan Kadivala as PW.11 at Exh.37, (xii) Parshotambhai Somabhai Parmar as PW.12 at Exh.38, and (xiii) Ramakant Kanaiyalal Upadhyay as PW.13 at Exh.40, to prove its case against the accused. The prosecution also produced documentary evidence such as yadi sent by C.P.I. Mr.Parmar to Executive Magistrate Mr.Jashvantlal Patel for holding identification parade at Exh.11, panchnama of test identification parade at Exh.12, complaint of Kiritbhai at Exh.16, panchnama of seizure of bunch of keys at Exh.21, panchnama indicating discovery of Rs.6,000/- at Exh.25, panchnama of place of incident at Exh.27, panchnama of seizure of scooter at Exh.28, arrest panchnama of accused Nasirkhan at Mark 'A', panchnama indicating recovery of Rs.7,645/- at Exh.34, panchnama indicating discovery of Rs.8,820/- at Exh.35, panchnama regarding cash of Rs.13,000/-, which was handed over by D.C.P. City Crime Branch, Ahmedabad to C.P.I. Mr.Parmar at Exh.36 etc. in support of its case against the accused.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, case of the accused was that they were falsely arrested by the police, but were not connected with the incident at all. However, none of them led any evidence to substantiate their claim that they were innocent and were falsely involved in the case by the police.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that robbery of Rs.70,000/- as well as scooter and bunch of keys belonging to complainant Kiritbhai was committed. According to the learned Judge, while committing robbery deadly weapon was used. What was held by the learned Judge was that it was proved by the prosecution that the appellants had committed offences under Sections 392, 397 r.w.section 120B IPC, but it was not proved by the prosecution that original accused Nos.1, 4 & 5 were involved in the incident. It was further held by the learned Judge that commission of offence punishable under

the provisions of the Arms Act was not established by the prosecution. According to the learned Judge, it was also proved by the prosecution that the two appellants were party to a criminal conspiracy to commit offence punishable with R.I. for a term of two years and upward and had committed offence punishable under Section 120B I.P.C. In view of abovereferredto conclusions, the learned Judge has convicted the appellants under Sections 392, 397 and Section 120B I.P.C. and imposed sentences referredto earlier by judgment dated October 17, 1997, giving rise to instant appeal.

6. It may be stated that acquittal of original accused Nos.1, 4 & 5 is not challenged by the State Government in any acquittal appeal and has become final.

7. Ms.Banna Dutta, learned counsel of the appellants, contended that evidence relating to identification of appellant No.1 at test identification parade by original complainant is unreliable, as the complainant had opportunity of identifying the said appellant at the police station while he was in police custody and, therefore, the learned Judge of the trial Court was not justified in holding that involvement of appellant No.1 in the incident was proved by the prosecution. According to the learned counsel, no evidence has been tendered by the prosecution regarding identification of appellant No.2 as one of the accused who was involved in the incident dated May 11, 1996 and, therefore, his identification in Court by the complainant should not have inspired confidence of the trial Court, more particularly when the incident had taken place during night time and the offenders were unknown to the complainant. What was urged was that the complainant had not identified the currency notes which were recovered pursuant to so-called disclosure statements made by the appellants as belonging to him and, therefore, robbery of cash with scooter and bunch of keys was not established by the prosecution at all. It was argued that though it was claimed by the complainant that he was dragged when the Car was in motion for about a distance of half a Kilometer and his knees etc. were injured, no medical evidence was tendered to substantiate his claim and as the evidence of the complainant is untrustworthy, the same should not inspire confidence of the Court. It was submitted by the learned counsel of the appellants that the learned Judge of the trial Court has failed to appreciate the evidence on record in its proper perspective and, therefore, the appeal filed by the two appellants should be accepted.

8. Ms.Paurmi B.Sheth, learned A.P.P., contended that though the complainant was not knowing appellant No.2 by name, he was properly identified in the courtroom during the course of recording of his testimony and, therefore, absence of evidence relating to test identification parade of appellant No.2 does not affect the prosecution case against him at all. It was maintained that testimony of witness Jashvantlal Patel, who was then Executive Magistrate and Mamlatdar, establishes that at the test identification parade held on June 22, 1996 complainant had properly identified appellant No.1 and, therefore, involvement of appellant No.1 in the incident is beyond pale of doubt. The learned counsel of the State Government emphasised that absence of medical evidence indicating that complainant Kiritbhai Patel had sustained injuries in the incident is of no consequence when his substantive evidence before Court establishes that appellants had committed robbery of cash, scooter as well as bunch of keys belonging to him and, therefore, well-founded conviction of the appellants should be upheld by the Court, more particularly when the learned counsel of the appellants has failed to dislodge the reasons recorded by the learned Judge of the trial Court while convicting the appellants under Sections 392 and 397 read with Section 120B of I.P.C.

9. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. The main evidence tendered by the prosecution against the appellants consists of (i) Jashvantlal Chunilal, who was Executive Magistrate and in whose presence it is claimed that the complainant had identified appellant No.1 as the person who was involved in the incident of robbery which had taken place on May 11, 1996, and (ii) Kiritbhai Gordhanbhai Patel i.e. the victim and the complainant. It is true that the testimony of witness Jashvantlal Chunilal Patel read with the contents of panchnama of test identification parade produced by the prosecution at Exh.12 and examination-in-chief of complainant Kiritbhai Gordhanbhai Patel recorded at Exh.15 would prima-facie indicate that complainant Kiritbhai had identified appellant No.1 as one of the persons who was involved in the incident of robbery which had taken place on May 11, 1996. However, para-7 of the testimony of complainant Kiritbhai shows that after the accused were arrested, he had gone to the police station and five accused persons were present at the police station. What is mentioned by complainant Kiritbhai in para-7 of his testimony is that the police had informed him that those five persons were

the persons who were involved in the loot. It was also mentioned by him that all the five accused had put on bushirt and pants. A reasonable reading of testimony of the complainant makes it evident that before holding of test identification parade, he had opportunity to see the accused and were introduced to him by police as persons who had participated in loot. Under the circumstances, the evidence tendered by the prosecution regarding test identification parade of appellant No.1 becomes meaningless. Having regard to the testimony of complainant Kiritbhai, this Court is of the opinion that the learned Judge of the trial Court was not justified in holding that involvement of appellant No.1 in the incident which had taken place on May 11, 1996 was proved by the prosecution beyond reasonable doubt. It may be stated that the incident in question had taken place at about 8.00 PM on May 11, 1996 and the place where the incident had taken place was totally deserted. The description of manner in which the incident had taken place, by the complainant makes it evident that he must have been scared and, therefore, it is not probable that he would be able to identify appellant No.1 as one of the persons who was involved in the incident, unless he was shown appellant No.1 prior to holding of identification parade. As it is not established by the prosecution that appellant No.1 was one of the persons who was involved in the incident of robbery which had taken place on May 11, 1996, the appellant No.1 is entitled to benefit of reasonable doubt which arises from the facts of the case.

10. As far as appellant No.2 is concerned, prosecution has not led any evidence regarding his identification by the complainant before Mamlatdar or Executive Magistrate. Though some vague references have been made by P.I. Mr.Parmar in his testimony before Court in this regard, the prosecution has not tendered evidence of Executive Magistrate before whom identification parade was held nor examined any of the panch witnesses indicating that identification parade was held in their presence by Executive Magistrate at which the complainant had identified the appellant No.2 as one of the perpetrators of the crime nor the complainant has stated in his substantive evidence before the Court that he had identified the appellant No.2 at a test identification parade, nor panchnama of test identification parade indicating identification of appellant No.2 by the complainant as one of the persons involved in the incident is produced. Therefore, vague references made by P.I. Mr.Parmar relating to identification of appellant No.2 by the complainant at test identification parade cannot be construed as

evidence led by the prosecution relating to identification of appellant No.2 at the test identification parade. As observed earlier, it is in terms admitted by the complainant in his cross-examination that after the accused were arrested, he had visited the police station and found that all the five accused were present. It means that appellant No.2 was also present at the time when the complainant had visited the police station. His evidence further shows that he was informed by the police that those five persons were the persons who were involved in the offence of robbery which had taken place on May 11, 1996. Under the circumstances, identification of appellant No.2 in the courtroom by the complainant after about more than one year is of no consequence, more particularly when, on his own admission, the complainant was not knowing any of the accused. The evidence of identification in Court normally should not be given any weightage when there is no corroboration of it by test identification parade in which the accused could have been identified. Thus, this Court is of the opinion that the prosecution has failed to establish that appellant No.2 was also involved in the incident dated May 11, 1996, wherein the complainant was robbed of cash, scooter and bunch of keys. Though it was his case that he was dragged for half a kilometer and had sustained injuries on his knees and neck, no medical evidence could be adduced to substantiate the same. On reappreciation of evidence on record, this Court finds that the prosecution has failed to establish satisfactorily that the appellants were involved in the incident of robbery wherein the complainant was robbed of his cash, scooter and bunch of keys and, therefore, both the appellants are entitled to benefit of reasonable doubt which arises from the facts of the case.

For the foregoing reasons, the appeal is allowed. Judgment dated October 17, 1997 rendered by the learned Additional Sessions Judge, Nadiad, in Sessions Case No.71 of 1997 convicting the appellants under Sections 392 & 397 read with Section 120B IPC and sentencing each of them to R.I. for 14 years and fine of Rs.20,000/-, in default, R.I. for four years for commission of offence under Section 392 I.P.C. as well as R.I. for seven years and fine of Rs.10,000/-, in default, R.I. for two years for commission of offence under Section 397 I.P.C. and R.I. for five years and fine of Rs.10,000/-, in default, R.I. for one year for commission of offence under Section 120B I.P.C. is hereby set aside. The information supplied by the learned counsels of the parties appearing in this case indicates that appellant No.1 i.e. Mohmed Haroon Mohmed Anwar Shaikh is convicted

under Sections 302 & 397 I.P.C. and sentenced to suffer R.I. for life and fine of Rs.5000/-, in default, R.I. for one year for commission of offence under Section 302 I.P.C. as well as imprisonment for life and fine of Rs.3000/-, in default, S.I. for one year for commission of offence under Section 397 I.P.C. by the learned Additional Sessions Judge, Nadiad, in Sessions Case No.49 of 1997 vide judgment dated March 12, 1999, which is subject matter of challenge in Criminal Appeal No.285 of 1999. Therefore, though he is acquitted in this case, he would not be entitled to claim his release from jail forthwith on the basis of acquittal recorded in this case because his presence in jail is needed with reference to another case referred to earlier. As far as appellant No.2 is concerned, the record of the case and more particularly information supplied by the State Government while deciding applications for temporary bail submitted by appellant No.2, would show that he is involved in following cases :-

Sr. No.	Police Station / C.R.No.	Offences under Sections	Details regarding Disposal of cases
1.	D.C.B. Police Station I-8/96, C.C.No.979/96	399, 400, 307 114 of IPC	On bail since 7.4.98
2.	Satellite P. Stn. I-219/96 C.C.No.1050/96	379, 114 of IPC	On bail since 7.4.98
3.	Ellisbridge P.Stn. I-91/96, C.C.No.1052/96	-do-	-do-
4.	Ellisbridge P.Stn. I-178/96, C.C.No.1053/96	-do-	-do-
5.	Vejalpur P.Stn. I-42/96, C.C.No.1049/96	-do-	-do-
6.	Navrangpura P.Stn. I-294/96, C.C.No.1051/96	-do-	-do-
7.	Navrangpura P.Stn. I-779/95	399, 400, 307,118, 370 of IPC	On bail since 27.4.98
8.	Ghatlodia P.Stn. I-11/96, C.C.No.992/96	379, 114 of IPC	on bail since 7.4.98
9.	Anand Police Stn.	-	Acquitted on 6.9.99

I-82/94

10. Nadiad Police Stn. - On bail since 16.4.98
I-399/96

11. D.C.B.Police Stn. 120B, 121, 122 Disposed of on
I-2/2001 of IPC 25.11.02

12. D.C.B.Police Stn. 120B, 121A, 122 On bail since
II-3029/2000 of IPC 18.1.2002
C.C.No.62/01 25(1)(AB), 27, 29
of Arms Act

13. Unjha Police Stn. 364A, 365 IPC On bail since 1.1.02
I-7/01 C.C.No.198/01

14. Sabarmati P.Stn. 309, 504, 427 On bail since
I-341/2002 of IPC 22.01.2003

Therefore, appellant No.2 shall also not be released from jail, unless his presence is not needed with reference to any of the cases referred to hereinabove. The muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(M.C.Patel,J.)

(patel)